Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 05-

IN THE

Supreme Court of the United States

SYSTEMS DIVISION, INC.,

Petitioner,

v.

TEKNEK ELECTRONICS, LTD. and TEKNEK LLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The question is whether, in a patent infringement case, where a jury has found by clear and convincing evidence, that a defendant did not have a reasonable basis for any defense, as part of its finding of willful infringement, a court in the exercise of its discretion, in refusing to increase damages or award attorneys' fees, may use as one of its bases, the fact that the court simply disagreed with the jury's conclusion and substituted its opinion, that the defendant did have a colorable defense, for that of the jury.

That question raises the fundamental question as to whether or not a court taking such action, constitutes a de facto deprivation of a patent infringement plaintiff's right to trial by jury.

CORPORATE LISTING UNDER RULE 29.6

Petitioner, Systems Division, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

Petitioner, Systems Division, Inc., respectfully requests that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Federal Circuit.

OPINIONS BELOW

This appeal is from the denial of the petition for *en banc* review (Appendix A) of the per curiam affirmance (Appendix B) of the decision of the Court below.

The decision of the District Court was not published. It is reprinted herein as Appendix C.

STATEMENT OF JURISDICTION

The per curiam affirmance by the Court of Appeals for the Federal Circuit was entered on February 7, 2006. Systems Division Inc. timely filed a petition for rehearing and suggestion for rehearing *en banc*, which was denied on March 16, 2006. This petition is being filed within 90 days of the denial of the petition for rehearing and suggestion for rehearing *en banc*.

The jurisdiction of this Court to review the judgment of the Court of Appeals for the Federal Circuit (CAFC) is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1338(a)

STATEMENT OF THE CASE

Plaintiff, Petitioner, sued Defendants for patent infringement. Included in the allegations of the complaint was an allegation that the infringement was willful.

On the issue of willfulness the jury was instructed as follows:

> . . . Willfulness must be proven by clear and convincing evidence showing that:
>
> * * *
>
> B. The defendant had no reasonable basis for believing (a) that the defendant's product did not infringe the plaintiff's product or (b) that the plaintiff's patent was invalid.

The jury found the Defendants guilty of willful patent infringement.

Plaintiff's request for enhancement of damages and awarding of attorneys' fees was denied by the Court. The primary reason given by the Court was the Court's determination that:

> In sum, the Court finds that this was not an egregious case of bad faith. Instead, it was a case where the defendant, Teknek, could have done more to investigate its possible infringement, **but had colorable defenses which happened to not succeed before the jury**.

It is undisputed that Defendant presented no evidence as to its state of mind. It presented, no opinion of counsel and presented no witnesses to testify on the issue of Defendants willfulness.

The Court's determination was based essentially on its belief that the jury was incorrect in its finding, and therefore it substituted its analysis for that of the jury's.

The Court also found that there was sufficient basis to support all of the jury's findings. It did so in denying Defendants' motion for JMOL and for new trial. (App. D).

Both parties appealed. Plaintiff appealed on the basis that the Court's determination constituted a blatant disregard for the finding of the jury and, as such, constituted a violation of Plaintiff's Seventh Amendment rights to trial by jury. It was and is, Plaintiff's position that a right without a remedy is not a right and that by refusing to provide Plaintiff with any rights, as a result of the jury's verdict, the Court denied Plaintiff its Seventh Amendment rights.

While the panel acknowledged that there is in fact Federal Circuit law requiring the lower court to follow decisions of juries, it ignored that case law as well as the Seventh Amendment and simply entered a per curiam affirmance, thus denying both Plaintiff's and Defendant's appeals.

Because, in Plaintiff's opinion, the issues presented raised fundamental constitutional rights, Plaintiff requested an *en banc* review. That request was also denied without opinion.

REASONS FOR GRANTING THE PETITION

No one has disputed the right of a party to have the determination of willfulness decided by a jury. The question is what does a finding of willfulness mean to the party who has been successful in obtaining such a finding by a jury.

What the lower court did, in this case, was to simply substitute its conclusion for that of the jury and then, in the exercise of its discretion in refusing to enhance damages or award attorneys fees, it gave as its primary reason its

conclusion that there was a colorable defense. In other words, Plaintiffs' successful trial of the willfulness issue to the jury, conferred no benefit, whatsoever, on the Plaintiff in this case.

No one denies that the Court has discretion in making the determination concerning enhancement and attorneys fees, but that discretion is limited. By allowing a court to simply disregard the determination of the jury, in this case, in the exercise of the Court's discretion, the Court deprived Plaintiff of any benefit from its successful jury verdict on this issue. Because Plaintiff was deprived of any remedy from its jury rights, and because a right without a remedy is not a right at all, Plaintiff was, *de facto*, denied its Seventh Amendment right to trial by jury.

This raises a fundamental issue as to whether or not a party which has been successful in obtaining a jury verdict, on a complex and often difficult issue in patent cases, can simply be deprived of its constitutional rights based upon a court's simple disagreement with the findings of the jury.

The Court of Appeals for the Federal Circuit has already dealt with this issue in *Jurgens, et al. v. CBK Ltd., et al.*, 807 3d 1566 (Fed. Cir. 1996). In that case, the Court clearly held that a judge is, in fact, bound by a jury verdict where willfulness is concerned.

Because, the Court in this case, totally disregarded the jury's findings, it is submitted that the issue remains an open question as far as the CAFC is concerned.

While this issue may not be one of profound social significance, it is nonetheless an issue which goes directly to the heart of the meaning of jury trials in patent infringement cases, and it is respectfully submitted, that, because it involves such a fundamental question as the right to trial by jury, it is a matter which is of constitutional importance.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED FEBRUARY 7, 2006

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

05-1081, -1094

SYSTEMS DIVISION, INC.,

Plaintiff-Cross Appellant,

v.

TEKNEK ELECTRONICS, LTD. and TEKNEK LLC,

Defendants-Appellants.

JUDGMENT

ON APPEAL from the UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

In CASE NO(S). 8:00-CV-00135

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam: (MICHEL, *Chief Judge*, MAYER and BRYSON, *Circuit Judges*):

Appendix A

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

s/ Jan Horbaly
Jan Horbaly, Clerk

DATED FEB 7, 2006

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DENYING PLAINTIFF'S MOTION FOR DAMAGE ENHANCEMENT, DENYING PLAINTIFF'S MOTION FOR ATTORNEY'S FEES AND GRANTING IN PART PLAINTIFF'S MOTION FOR PERMANENT INJUNCTION DATED AND FILED AUGUST 17, 2004

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CASE NO. SACV 00-0135 DOC (ANx)

SYSTEMS DIVISION, INC.,

Plaintiff,

v.

TEKNEK ELECTRONICS, LTD. and TEKNEK, LLC,

Defendants.

ORDER DENYING PLAINTIFF'S MOTION FOR DAMAGE ENHANCEMENT, DENYING PLAINTIFF'S MOTION FOR ATTORNEY'S FEES AND GRANTING IN PART PLAINTIFF'S MOTION FOR PERMANENT INJUNCTION

Before the Court is the motion by Plaintiff, Systems Division, Inc. ("SDI"), for enhancement of damages, attorney's fees incurred in this action, and a permanent injunction. After presiding over the jury trial in this action, review of the moving, opposing, and replying papers regarding this motion, after the hearing on August 16, 2004, and for the reasons given below, the Court DENIES the motion for enhanced damages, DENIES the motion for attorney's fees, and GRANTS IN PART the motion for permanent injunction.

Appendix B

I. BACKGROUND

This action proceeded to trial before a jury beginning on July 6, 2004. The jury returned a special verdict form indicating that (1) neither of Defendants' ("Teknek's") products presented at trial in support of Teknek's invalidity defenses, the "XCM 1830" and the "MiniLab," were analogous art, (2) none of the claims asserted by SDI in this suit are anticipated by or obvious in light of these two products, (3) Teknek, through production and sale of its "CM5 mk2" and "CM6" machines, is liable for infringement of United States Patent No. 5, 813,073, Claims 1 through 13 and Claim 16, United States Patent No. 5,989,358, Claims 1 through 13 and Claim 16, and United States Patent Number 6,200,392, Claims 1 through 16, Claims 20 through 24, Claims 26 through 29, Claim 31, and Claims 33 through 35, (4) the infringement was willful, and (5) that SDI suffered damages in the amount of $3,000,000.

SDI now moves for a trebling of the damages, award of its attorney's fees incurred in this action, and a permanent injunction.

II. DAMAGE ENHANCEMENT

"A finding of willfulness does not mandate enhanced damages" *Electro Scientific Indus. v. General Scanning, Inc.*, 247 F.3d 1341, 1353 (Fed. Cir. 2001), *see also Brooktree Corp. v. Advanced Mircro Devices, Inc.*, 977 F.2d 1555, 1582 (Fed. Cir. 1992). Enhancement of damages is within the discretion of the trial court after consideration of all of the facts and circumstances of the case. The Federal Circuit has outlined factors that should be considered in the exercise of this discretion. *Read Corp. v. Portec, Inc.*, 970 F. 2d 816 826-28 (Fed. Cir. 1992). Those factors are:

> (1) whether the infringe deliberately copied the ideas or design of another, (2) whether the infringer, when he knew of the other's patent protection, investigated the scope of the patent and formed a good-faith belief that it was invalid or that it was not infringed, (3) the infringer's behavior as a party to the litigation[,] (4) [d]efendant's size and financial condition[,] (5) [c]loseness of the case[,] (6) [d]uration of defendant's misconduct[,] (7) remedial action by the defendant[,] (8) [d]efendant's motivation for harm[,] and (9) [w]hether defendant attempted to conceal its misconduct.

Id. ("*Read* factors")

A. Deliberate Copying

The designs of the Teknek devices were similar to the one disclosed in SDI's patent, but they were not identical. However, the Court finds that this factor leans in SDI's favor because the timing of the introduction of Teknek's devices does suspiciously coincide with the introduction of SDI's product which embodied the patents at issue in this case which provides an indication of copying or at least influence.

B. Investigation and Good Faith Belief by Teknek as to Liability

The Court finds that this factor does not favor SDI or Teknek. SDI is correct that Teknek could have done more to insure that it had a basis for believing that it did not infringe the patents, an opinion letter from patent counsel would have improved Teknek's position immensely. Furthermore, the jury explicitly found Teknek's infringement to be willful.

Other considerations favor Teknek. Notwithstanding the jury finding of willful infringement, the Court is convinced that Teknek

had a good faith belief that it could prevail on at least the invalidity question. In fact, this Court entered summary judgment on that issue in favor of Teknek and was later reversed on appeal. It would be highly inconsistent and unfair for the Court to find that the SDI patents were invalid because of obviousness and to state, after being reversed, that Teknek had no good faith basis for believing that the claims were obvious.

The wisdom of the jury's determination that the XCM 1830 and MiniLab were not analogous art may also be debatable. While the patented device was apparently conceived as a device to clean printed circuit boards, all of the evidence in the record was that the machines manufactured by both SDI and Teknek are used to clean a variety of materials, including glass and film. The XCM 1830 was designed to clean glass and the MiniLab was designed to clean film. It was undisputed that the accused devices clean a variety of materials, not only printed circuit boards. There was considerable evidence in the record to lead a factfinder to believe that the XCM 1830 and the MiniLab were analogous to the patented device.

SDI also argues that there was no evidence in the record that the prior art taught addition of the mounting apparatus (a telescoping slide drawer) to a sheet cleaning machine. The Court disagrees. Teknek's invalidity expert testified extensively as to the knowledge in the art of telescoping slide drawers as well as their uses, advantages, and limitations. Teknek, through its expert, made the argument that the use of telescoping slide drawers in numerous highly analogous applications would suggest use of a telescoping slide drawer to hold the roller cartridge assembly.[1]

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1. No explicit suggestion is needed for a finding of obviousness. *See Motorola, Inc. v. Interdigital Tech Corp.*, 121 F.3d 1461, 1472 (Fed. Cir. 1997) ("there is no requirement that the prior art contain an express suggestion to combine known elements to achieve the

(Cont'd)

In fact, Teknek's expert made an explicit analogy to filing cabinets. In the analogy, the prior art XCM 1830 was a cheap filing cabinet with no telescoping drawer where the drawer and contents (here the roller cartridge) fall out if you pull them out too far. The patented machine was a more expensive file cabinet with a telescoping slide drawer to prevent the contents from falling out. Teknek's expert also provided testimony to suggest that the XCM 1830 may not have been equipped with a telescoping slide drawer due to unavailability of mass produced telescoping slide drawers that could sustain the weight of the much larger XCM 1830 rollers.

In sum, the Court finds that this was not an egregious case of bad faith. Instead, it was a case where the defendant, Teknek, could have done more to investigate its possible infringement, but had colorable defenses which happened to not succeed before the jury.

C. Teknek's Behavior During Litigation

SDI spent a large amount of time at trial attempting to prove that the XCM 1830 machine owned by Teknek had once been equipped with a so-called "top drive". The XCM 1830 was a machine with four cleaning rollers. Two of the rollers ("driven rollers") were always attached to a drive mechanism, but the other two rollers could either be turned by the driven rollers or could be directly attached to the drive mechanism through the use of the "top drive" – a simple removable gear mechanism.

(Cont'd)

claimed invention. Rather, the suggestion to combine may come from the prior art, as filtered through the knowledge of one skilled in the art"), *see also In re Oetiker*, 977 F.2d 1443, 1448 (Fed. Cir. 1992) (Nies, C.J., concurring) ("In sum, it is off the mark for litigants to argue, as many do, that an invention cannot be held to have been obvious unless a suggestion to combine prior art teachings be found in a specific reference.")

Appendix B

It would take longer to remove and replace the roller cartridge assembly from an XCM 1830 machine equipped with a top drive than from one without a top drive. There was no evidence introduced that this increased time would be substantial relative to the Court's definition of "ready removal and replacement". The only evidence on this point was that even with top drive, read removal and replacement for the XCM 1830 was well within the five minute timeframe set by the Court.

The reason why this is relevant to a discussion of misbehavior during litigation is that SDI repeatedly implied that Teknek was lying about the absence of a top drive on the machine that Teknek had repurchased from a customer. SDI presented the possibility that a top drive had been installed on the particular machine due to marks on the roller shafts of the machine. Teknek witnesses stated that they did not believe that a top drive had been attached to the particular machine. Besides the fact that this entire line of testimony was almost completely irrelevant,[2] SDI never presented any direct evidence that Teknek was lying. SDI claims that a top drive had been mounted, Teknek disagreed.

There is no evidence that Teknek misbehaved in any way during the course of this litigation.

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2. Whether or not the particular machine repurchased by Teknek was ever equipped with a top drive only has the slimmest relevance to the question of whether Teknek ever sold an XCM 1830 without top drive. To state the obvious, the particular machine may have been sold without a top drive and later equipped with one by the customer, and even if the particular machine was sold with a top drive, that does not mean that all other XCM 1830s were sold with a top drive.

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D. Teknek's Size and Financial Condition

From all of the information before the Court, Teknek appears to be a relatively small enterprise so there is no reason to increase the award to enhance the punitive effect.

E. Closeness of the Case

The Court believes that this case was close. In particular, the Court finds that Teknek put on a very strong invalidity case. After Teknek's presentation at trial, the Court was convinced that the only additional element present in the SDI independent claims that was not present in the Teknek XCM 1830 machine was a telescoping slide drawer to hold the roller cartridge assembly. Furthermore, Teknek demonstrated that the relative advantages of telescoping slide drawers are well-known in mechanical engineering. Apparently, the jury felt that the addition of a telescoping slide drawer to the XCM 1830 machine would not clearly be obvious to one skilled in the art,[3] but, after hearing the testimony, the Court believes that at least some, if not many, factfinders would find differently.

Teknek presented little, if any, evidence of non-infringement, but SDI presented little evidence of *infringement.* The infringement evidence presented at trial consisted of a demonstration of removal and replacement in the preferred embodiment of the SDI patents (in completed machine form), a demonstration of removal and replacement in one of the accused devices, and entry of the machines into evidence. SDI made no attempt to match the features of the accused devices to the language of the claims. Presumably, the laypersons on the jury were left to do this on their own using the devices admitted into evidence.

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3. Invalidity, including obviousness, must be proven by clear and convincing evidence.

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The Court finds that the jury verdict understates the closeness of this case.

F. Duration of Misconduct

Since the Court believes that Teknek had reasonable defenses, any continued infringement over the course of litigation will not be held against it. This is especially appropriate in this case because this Court denied SDI's motion for a preliminary injunction.

G. Remedial Action by Teknek

This factor does not appear to be relevant to this case.

H. Teknek's Motivation

SDI has presented no evidence that Teknek was motivated by malice or any other reason other than legitimate competition. Teknek has traditionally been the leader in the market for sheet cleaning machines such as those at issue in this case. As such, it has developed innovations from time to time and holds or licenses patents of its own. At worst, Teknek mimicked a new feature from its competitor that it reasonably thought was unpatentable. It was wrong and now must compensate SDI.

I. Concealment of Infringement by Teknek

SDI has presented no evidence that there was ever any concealment of the accused devices or alleged infringement by Teknek.

The balance of the *Read* factors does not favor enhancement of damages. While a jury finding of willfulness can serve as the basis for enhancement of damages, the trial court is not bound to do so. This is simply not an "exceptional" case. It is a quite ordinary case of a defendant challenging a patent held by a competitor that it reasonably believed to be invalid.

III. ATTORNEY'S FEES

The Court recognizes its discretion to award attorney's fees in an exceptional patent case 35 U.S.C. § 285. As the Court discussed above, while the jury delivered a convincing victory to SDI, the case was not "exceptional." Teknek had colorable defenses, but it lost. There has been no apparent egregious conduct by Teknek that would set this case apart from the normal case. SDI makes an attractive argument that fee shifting is appropriate because the deterrent effect of compensatory damages is insufficient, but this argument can be made in any patent case.[4] The statute does not provide for fee shifting in every case, it provides for fee shifting in the "exceptional" case.

As the discussion of the *Read* factors illustrates, this Court does not find this to be an exceptional case and attorney's fees are not awarded to SDI.

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4. The Court understands Plaintiff's general argument that compensatory damages may not adequately deter an infringer from infringing. This argument can be made in a number of areas of the law, not just in patent infringement. The American legal system has generally found that the potential underdeterrence to harmful conduct is preferable to the potential suppression of meritorious allegations or defenses that could result from fee shifting.

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IV. INJUNCTION

While SDI is entitled to an injunction to prevent future harm, 35 U.S.C. § 283, the Court agrees with Teknek that the proposed injunction is too broad.

A. Repair Parts

The Court declines to enjoin Teknek from sale of repair parts and services for the infringing machines already sold although the Court recognizes that it may have the discretion to do so. SDI did not request compensation at trial for repair parts that would have been sold and no evidence was received regarding how often these devices require repair, the types of parts that require repair, or the rates charged to customers for repairs. The Court also notes that no particular part of the device that might be replaced is patented, only the device as a whole, and that the novel aspects of the patented device are only a small part of the overall utility of the device.

The Court finds that SDI could have requested damages for profits associated with repairs, but it did not. This Court declines to issue an equitable remedy, especially one that could be used to harm legitimate competition as well as the infringer's innocent customers, when the plaintiff has not requested an otherwise adequate remedy through damages. *Cf. Carborundum Co. v. Molten Metal Equip. Innovations, Inc.*, 72 F.3d 872, 881-82 (Fed. Cir. 1995) (where permanent injunction issued before damages portion of bifurcated trial, plaintiff "did not attempt to obtain damages for future repair parts sales because the injunction prohibited MMEI from selling parts.")

SDI also cannot bar Teknek from repairing the machines on a theory of contributory infringement of the method claims. As the Supreme Court has noted:

> A patentee, in demanding and receiving full compensation for the wrongful use of his invention in devices made and sold by a manufacturer adopts the sales as though made by himself, and therefore, necessarily licenses the use of the devices, and frees them from the monopoly of the patent.

Union Tool Co. v. Wilson, 259 U.S. 107, 113, 42 S.Ct. 427, 429 (1922). Since SDI has been compensated for the sale of the infringing machines, the continued use of the machines by Teknek customers would no longer constitute infringement of the method claims and repair of the machines would not be contributory infringement.

B. Adhesive and Cleaning Rollers

SDI has provided no basis for prohibiting the sale of non-patented adhesive and cleaning rollers. As the evidence in the record shows, rollers by different manufacturers are basically interchangeable. The Court sees no reason to deny Teknek the ability to compete in the market for these non-infringing items.

The Court would also repeat its observation that SDI did not request an otherwise adequate damages remedy for the future rollers to be used in infringing machines. Instead, it seeks broad injunctive relief that is likely to damage competition beyond the scope of its patented claims.

For the reasons given in the "Repair Parts" section, sale of rollers to owners of the infringing devices does not constitute contributory infringement of the method claims.

C. Machines Not Necessarily Covered by the Patents at Issue

SDI has also provided no basis for the broad injunction against "any machine containing the elements contained therein, including a roller cartridge assembly, a mounting assembly for mounting a roller cartridge assembly, and a roller for cleaning sheet cleaning rollers (paper or sticky rollers)". This proposed injunction would radically expand the scope of SDI's patent and appear to be designed to remove Teknek completely from the sheet cleaning machine business. Its broadness is unacceptable.

D. Accounting

There is also no basis for the accounting proposed by SDI. Sales information was made available to SDI through discovery, and the jury has returned a damages verdict based on sales information SDI presented at trial. SDI claims, without apparent basis, that Teknek may be fraudulently transferring funds to avoid the judgment. While the Court would likely have the authority to order an accounting in such a situation to avoid injustice to the plaintiff, SDI does not provide enough evidence to support its belief that suich transfers are actually occurring. The request for an accounting is denied.

V. DISPOSITION

For the reasons given above, SDI's motions for enhanced damages and attorney's fees are DENIED. SDI's motion for permanent injunction is GRANTED consistent with the discussion in this order.

Appendix B

IT IS SO ORDERED.

DATED: AUGUST 17, 2004

s/ David O. Carter
DAVID O. CARTER
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DENYING PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC DATED AND FILED MARCH 16, 2006

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

05-1081, -1094

SYSTEMS DIVISION, INC.,

Plaintiff-Cross Appellant,

v.

TEKNEK ELECTRONICS, LTD. and TEKNEK LLC,

Defendants-Appellants.

ORDER

A petition for rehearing en banc having been filed by the Cross-Appellants , and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

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ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

FOR THE COURT

s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: 03/16/2006